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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1060

KAREN CONDIT and MARY E. ORAVEC,
Petitioners,

v.

UNITED AIR LINES, INC.
Respondent.

On Petition For A Writ of Certiori
To The United States Court of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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Petitioners have sought review of a judgment below that, because United's policy is "consistent" with its duty to assure safe air transportation, United may require all female flight attendants ("stewardesses") to take unpaid leaves of absence throughout the duration of pregnancy, even though (a) United offered no empirical evidence as to a factual basis for believing that most or even many such stewardesses cannot perform their duties as well as non-pregnant stewardesses during at least the first six months of pregnancy, (b) the trial court found that the Federal Aviation Administration takes the position that

the issue should be dealt with on an individual basis rather than by a general policy such as United's, and (c) the trial court found that one major U.S. carrier, Northwest, permits pregnant stewardesses to continue working on an individualized basis even beyond the sixth month of pregnancy. United has filed a Brief in Opposition to the Petition, urging (a) without citation of authority, that the statutory affirmative defense of "bona fide occupational qualification" is entirely a matter of fact and "not an issue of law," (b) that, while "virtually all other carriers" have the same forced leave policy as United, the decision below is of no public importance, and (c) that the case presents no federal question that is either important or in conflict with applicable decisions of this Court. Petitioners now submit this Reply to United's Opposition.

The Petition addresses in detail the public importance of this case and the decisions with which the judgment below is in conflict, but United ignores both the arguments and the cases. As to the importance, we note first that, after almost fourteen years of Title VII sex discrimination litigation in the lower courts, this Court has addressed the nature and scope of the "bfoq" defense on only one occasion, in Dothard v. Rawlinson, 45 U.S.L.W. 4888 (1977). 1/ There the Court stressed the

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1/ The Court did briefly discuss the business necessity defense in the context of maternity leaves in Nashville Gas Company v. Satty, 46 U.S.L.W. 4026, 4028, n. 5 [continued on following page]

"extremely narrow scope" of the defense and gave weight to the EEOC's guidelines mandating that narrow interpretation, see 45 U.S.L.W. at 4891, but it upheld the defense in a fact situation that it recognized to be virtually sui generis. As we stated in the Petition, we believe the decision below to conflict with the Court's analysis in Dothard, and the conflict is even more pointed with numerous Circuit decisions cited with favor in Dothard. See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan American

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1/ [continued from preceding page] (12/6/77), though the employer in Satty had not relied upon the defense. The Court noted that the policy of denying accumulated seniority might conflict with the employer's business interests by favoring inexperienced employees and by interfering with the motivation of female employees "because of the greater difficulty in advancing through the firm." Despite United's position here as to the great importance of the stewardess as a safety officer, United previously took the following position in explaining why the fact of marriage made stewardesses no longer useful employees:

"These same changes [resulting from marriage], the experts concluded, are not likely to occur with respect to male members of the flight crew whose jobs, unlike those of the stewardesses, contemplate lifetime careers with steady progression to higher levels of skill, and who over the years have exhibited

World Airways, 442 F.2d 385 (7th Cir. 1971); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969). Moreover, the decision is inconsistent with the Eighth Circuit's recent application of the bfoq defense, under the Age Discrimination Act, in Houghton v. McDonnell Douglas Corp., 553 F.2d 561, cert. denied, 46 U.S.L.W. 3357 (1977), and with the Seventh Circuit's rejection of the bfoq defense in the predecessor to this case, invalidating United's policy of prohibiting continued employment of all married stewardesses. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (1971).

Finally, the decision below is inconsistent with this Court's treatment of forced maternity leave rules for pregnant teachers in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). While LaFleur arose under the Fourteenth Amendment, the Court there was called upon to measure the justifications advanced by the school boards against the constitutional rights of employees not to be penalized by "overly restrictive maternity leave regulations . . . ."

1/ [continued from previous page] no comparable deterioration in work performance as a result of marriage." (Joint Appendix at 117)

Petitioners have lodged with the Clerk's Office of the Court a copy of the Joint Appendix as filed in the court below.

414 U.S. at 640. In invalidating the arbitrary four and five month cutoff dates because of their overbreadth and lack of "individualized determination" as to the capacities of individual teachers, the Court nonetheless recognized that the school boards' objectives were "perfectly legitimate, both on educational and safety grounds." 414 U.S. at 643-4. The constitutional standard, which the court found not to be met in LaFleur, was that of a rational relationship to an admittedly valid state interest. 414 U.S. at 632. Since this Court has recognized that the standard of justification under Title VII is more rigorous than under the Fourteenth Amendment, see Washington v. Davis, 426 U.S. 229, 246-7 (1976), we believe that the decision below upholding United's automatic forced leave rule merely on the basis of consistency with a valid objective is in conflict with LaFleur.

Even apart from the important general issue of the standard to be met by an employer, either under the bfoq or the "business necessity" defense in Title VII sex discrimination cases, review by this Court of the decision below is important in order to provide guidance to the federal courts in the numerous actions now pending in various stages throughout the country witn respect to the precise issue involved here -- the validity of the forced leave policy to which all major U.S. carriers other than Northwest have informally agreed. 2/ We discussed some of those cases in the Petition, but

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2/ United's statement that its policy is "in common with virtually all other [continued on following page]

United's opposition has ignored them in asserting that this case is of importance only to the litigants here. To date, four district courts have ruled on the validity of the forced leave rule for stewardesses subsequent to the district court's decision here. In MacLennan v. American Air Lines, Inc., 15 F.E.P. Cases 1684 (E.D. Va. 1977) (Bryan, J.), the court specifically rejected the rationale of Judge Lewis in this case, finding that "[t]he defendant must prove that the policy is reasonably necessary, not merely that it is 'reasonable,'" and it thus prohibited automatic termination of flight duty prior to the 26th

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2/ [continued from preceding page] air carriers" applies only to U.S. based air carriers that are members of the Air Transport Association and the Air Conference. Judge Lewis' opinion (App. B to Petition at 10a) addressed the efforts of those two industry organizations relating to the common policy, but the ability of the two organizations to prevent all members other than Northwest and two small carriers from changing the common policy despite the inability to produce evidence in support of it is best shown by correspondence between Air Conference and its members (see Plaintiff's Exhibits 5 and 7, Joint Appendix at 95-108) In PX 7, TWA assured Air Conference that, despite the attached study by its Chief Medical Officer concluding that pregnant stewardesses should be prohibited from flying only during the last three months of pregnancy, TWA would not adopt that change in policy in the absence of an "industry position" for such a change.

week of pregnancy. 15 F.E.P. Cases at 1689. (Emphasis in original.) In Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977), the court cited the opinions below with approval and reached the same result as in this case. In re National Airlines, Inc., 14 F.E.P. Cases 1806 (S.D. Fla. 1977), the court held that National had failed to justify the automatic forced leave policy as it applied to stewardesses prior to the 21st week of pregnancy. And, most recently, in EEOC v. Delta Air Lines, Inc., C.A. No. 74-H-918 (Consolidated) (S.D. Tex. 11/8/77 - unpublished), the court held that the opinions below and the Harriss case foreclosed the plaintiffs' claim on the forced leave issue, entitling Delta to summary judgment. 3/

The confusion evidenced by the four decisions as to the scope of the bfoq defense and as to the meaning of the opinions in this case is quite likely to continue not only in the appellate proceedings in those four cases but also in pending and undecided district court cases involving the same issue. Those cases include, but may not be limited to, Burwell v. Eastern Airlines, Inc., C.A. No. 74-0418 (E.D. Va., Richmond Division); ALPA et al. v. Western Airlines, Inc., C.A. No. C-74-1418 (N.D. Cal.); James v. Delta Airlines, Inc., C.A. No. 74-1676 A, (N.D. Ga.); Gardner et al., v. National Airlines,

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3/ The court in the Delta case did not refer to the decisions in the American and National cases, supra. Had it chosen to rely upon those cases, it could well have decided that plaintiffs, rather than Delta, were entitled to summary judgment.

Inc., C.A. No. 75-329-A (E.D. Va., Alexandria Division); and Willet v. Delta Airlines, Inc., C.A. NO. 75-C-1517 (N.D. Ill.).

In view of the numerous pending cases in the federal courts involving the same issues presented here, review by this Court would be warranted to establish the controlling principle of law even in the absence of the conflicts that we discussed above. See, e.g., United States v. Powell, 330 U.S. 238, 240 (1947).

United's final statement in its Opposition that petitioners seek only to have this Court "substitute its judgment for that of the trial court as to factual matters properly within the trial court's domain" is entirely without basis in the Petition. Neither in the Petition nor in the court below did petitioners urge that the principal error of the trial court lay in its treatment of the record. Rather, our consistent position has been that both the findings made by the trial court and the absence of other findings to support the trial court's decision precluded a judgment that United established either a bfoq or business necessity defense, unless both the bfoq guidelines issued by the EEOC (Appendix F to Petition at 34a-35a) and the scope of the defenses as found in Dothard and the other decisions discussed above are ignored. That is precisely what was done by the court below in its determination that United needed only to show that its forced leave rule was "consistent" with a valid objective. If that is the standard to be applied in any case where the employer invokes safety as a rationale, then safety will surely be asserted as the rationale by most employers in Title VII sex discrimination cases. No one would

deny, for example, that schoolteachers must be capable of promptly evacuating their students in fires and other emergencies, but the possibilities are much wider than that. In Weeks, for example, the employer sought to support its refusal to hire women as telephone switchmen in part because it feared the capacity of women to perform adequately in emergencies. 408 F.2d at 236. In reversing the district court's finding that a bfoq defense was established, the Fifth Circuit in Weeks gave short shrift to that argument. 4/ Had the Fifth Circuit followed the "consistent" with a valid objective standard applied by the court below, requiring no evidence of a factual basis to support the argument, the employer's safety justification should have carried the day in Weeks. In any event, under United's analysis, the appellate decisions in Weeks, Bowe, and Diaz, supra, were all incorrect, since each reversed a trial court's determination that the employer had established a bfoq defense and none rejected or even criticized any of the findings of fact made by the trial court. Rather, in each case, the court of appeals held that the findings were insufficient to establish the defense because the trial court had misconceived the very narrow and

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4/ "The emergency work which a switchman allegedly must perform consists primarily in the handling of a 34-pound extinguisher in the event of a fire. A speculative emergency like that could be used as a smokescreen by any employer bent on discriminating against women." 408 F.2d at 236.

limited scope of the bfoq defense. The court below, however, failed to apply that narrow legal standard, and that error, as the questions raised in the Petition show, is the basis for the Petition.

The short of it is that United's arguments in its Opposition meet none of the arguments in the Petition. The best that could be said of the decision below, from United's perspective, is that it is sufficiently limited in its treatment of this important and widely litigated issue that its impact upon other cases might be slight. The fallacy of that argument lies in the fact that at least some other courts are not so reading the decision. Indeed, as we have noted, the trial court in the Delta case has read it as precluding the plaintiffs even from having a trial to test the validity of Delta's position. See p. 7, supra.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the judgment of the Fourth Circuit.

Respectfully submitted,

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